No. 352

In the Supreme Court of the United States

OCTOBER TERM—1940

SUNSHINE MINING COMPANY,
a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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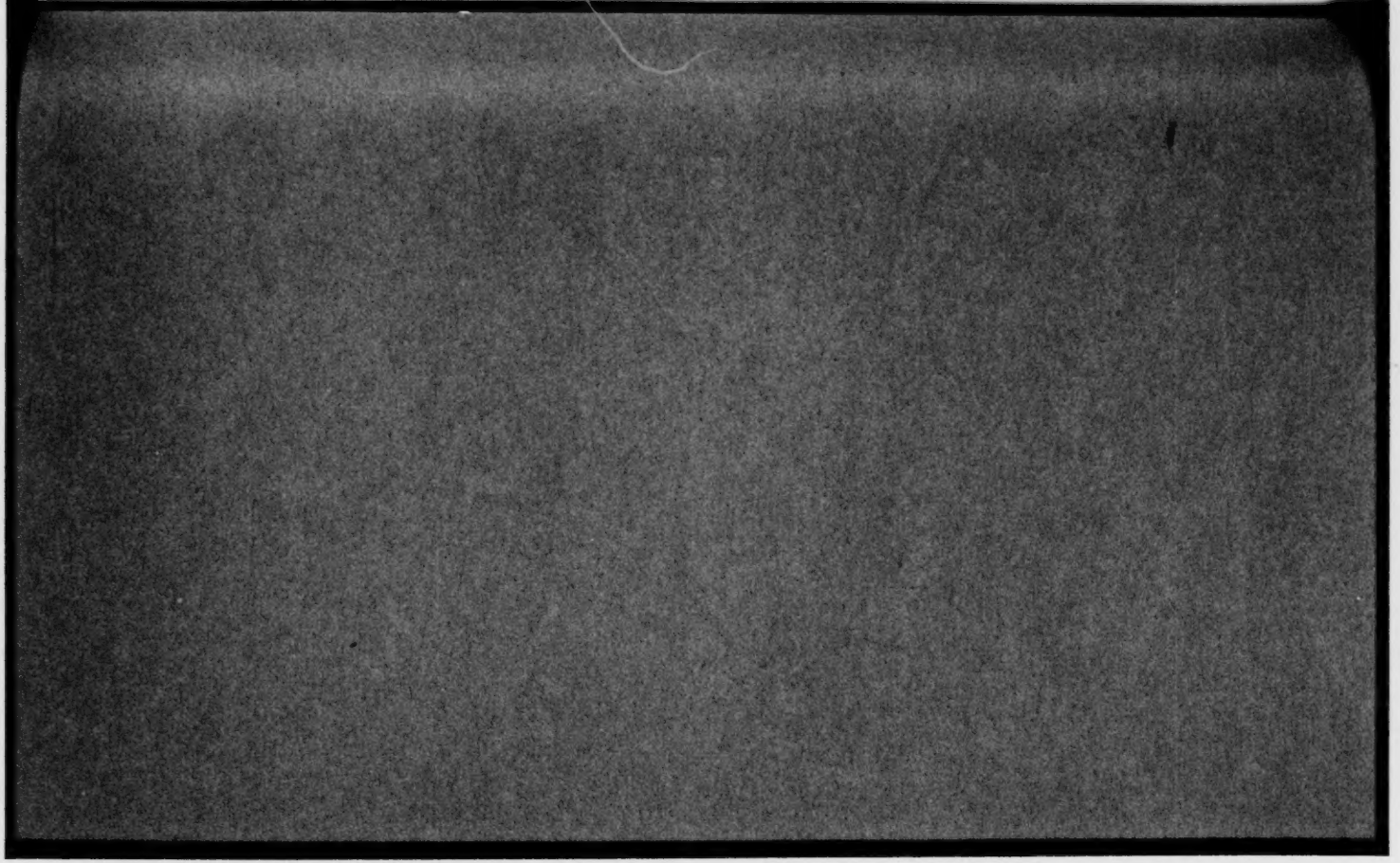

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PETITION FOR REHEARING

Petitioner, Sunshine Mining Company, respectfully petitions the court to reconsider its denial on January 13, 1941, of petitioner's application for a writ of certiorari, and grant it a rehearing.

Petitioner is constrained to do so, first, on account of the rapidly accumulating cases under the National Labor Relations Act and Wage and Hour Act raising the question of the power of Congress to regulate intrastate businesses which sell their entire output within the state of production; and, secondly, on account of the innumerable cases where employers, (like petitioner in this case), who honestly and in good faith and on reasonable grounds believe, either that one or more of the many federal regulative statutes do not apply to their operations, or that they are complying with such regulative laws and desire to secure a judicial decision of the acts' applicability or assurance that they are in fact not violating the acts.

The question in all of these cases is substantially the same: Whether an employer who sells all of his production to a purchaser within the state of production, is subject to the regulatory power of Congress in the absence of any evidence (and in this case in the absence of any finding of fact), that there is in fact an interference with interstate commerce, either actually or potentially existing.

This controversy is now pending in the United States District Court of Idaho in reference to the Wage and Hour

law in a case wherein this petitioner is a party, viz: *Sunshine Mining Company vs. Carver,* 34 F. Supp. 274.

It is now pending in the United States District Court of Texas in the case of *Dupree v. Bay-Tex Oil Corporation,* 4 Wage and Hour Reporter 8, issue of January 6, 1941, in which case Judge Allred, in dismissing an employee's action under the Wage and Hour Act, said:

> "I further conclude that defendant Bay-Tex Oil Corporation in producing oil from its leases in San Patricio County, Texas, selling such oil in its tanks on said leases to Atlantic Pipe Line Company, thereupon parting with possession, ownership and control of such oil which became the exclusive property of and under the exclusive control of Atlantic Pipe Line Company, was not engaged in interstate commerce and would not, therefore, become subject to the provisions of the Fair Labor Standards Act of 1938, the sale and departure from possession and control of such oil by said Bay-Tex Oil Corporation, being a completed transaction entirely intrastate."

The dispute is now pending in the District Court of Montana in the case of *Graham vs. Lexington Mining Company,* Cause No. 213, in which case the mining company, believing that, under the decision of the Ninth Circuit in *National Labor Relations Board v. Idaho-Maryland Mines Corp.,* 98 F. (2d) 129, it was not subject to the act because it sold all of its product within the state where mined, had not paid its employees one and a half times their regular wage (which was many times larger than the statutory minimum) for hours worked in excess of forty-two hours a week, and is now being sued for fifteen or twenty thousand dollars pen-

alties.

This dispute is now current between the Idaho-Maryland Mine Corporation and the Wage and Hour Division, the claim being that the Idaho-Maryland decision is not controlling,—a contention similar to the contention of the National Labor Relations Board as set forth in its Fourth Annual Report dated January 3, 1940, at page 113 (quoted on page 24 of Petitioner's petition for certiorari).

The dispute is now current between mine operators in Colorado and both the National Labor Relations Board and Wage and Hour Division.

This question has been the subject of impartial discussion and wonderment by writers in law reviews. 39 *Columbia Law Review* 818, 834, 835.

Not only in the mining industry is this question vital: in agriculture it is rapidly becoming the difference between operation and non-operation. The administrator of the Wage and Hour Division, in performing the duty delegated to him by Congress to define the agricultural exemption exempting certain kinds of labor performed within the "area of production", has defined the "area of production" to be an establishment employing not more than seven or ten employees, located in the open country or in a town not to exceed 2,500 population, and all produce comes from a distance of less than 10 miles. Many of these concerns sell their entire production to a purchaser within the state of production. Are they, or are they not, subject to federal

regulation?

To the author's personal knowledge, innumerable questions and disputes similar to these are now pending, and many more are developing, in reference to both of these labor laws.

Uncertainty and confusion have arisen from the apparent conflict between this Court's decisions and the position taken by the Ninth Circuit Court of Appeals in the *Idaho-Maryland*, *Sunshine*, and *Sterling Electric Motors* cases. This uncertainty is causing industry an undue confusion and an intolerable expense, and is retarding its ability to increase production and employment.

Not only that, but this uncertainty is multiplying by many times the work of administrative agencies and the lower federal courts.

Industry believes that these wholly intrastate operations are without the federal regulating power. Their attorneys, after exhaustive study, are convinced that they are without federal regulatory jurisdiction. These men, after study of this court's opinions, and especially the later cases, are firmly of that opinion and belief.

This uncertainty and confusion cannot end until this court clearly and emphatically answers the question.

The administrative agencies take the position (and apparently are justified) that the *Sunshine* case in effect removes the *Idaho-Maryland* case from the books, and, in

the Ninth Circuit at least, it has done so. They recognize no limitation whatsoever upon the scope of their powers. Industry, with the same stubbornness (both, we believe, made stern by an abiding conviction of the correctness of their own conclusions), contends that there is a limitation, and that Judge Allred's opinion states that limitation.

This means, and can only mean, until this question is settled by this Court, that in one form or another, either by certiorari or civil appeal or criminal appeal, the same question will be presented time and time again to this court.

The terrific expense entailed in bringing these cases to this court, the enormous penalties that have been and will be assessed against industry because they believe they are without federal jurisdiction, and who believe they have a constitutional right to have the question decided, should be avoided.

Uncertainties such as this greatly retard recovery and production. It seems to Petitioner that the question is one of the greatest importance in the administration of all federal reguatory laws, and especially important in the administration of the National Labor Relations Act and the Wage and Hour Law.

It is doubly important in reference to the National Labor Relations Act. This for the reason that, by virtue of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 48, there is no way an employer can have the question of the application of the Act to his operations decided until he has been

accused of unfair labor practices, had a hearing before the Board, awaited the intermediate report of the trial examiner, filed his exceptions to this report, argued or filed briefs, or both, with the Board; then await the order of the Board. In this case that process took just about one year.

The Board is empowered in its discretion (which means, in actual practice, every time) to order reinstatement *with back pay*. Until that moment the employer is prevented from getting any judicial decision upon the applicability of the act to him.

During all this time he has in good faith been contending that the administrative body did not have jurisdiction over him. Not until that moment does he know whether or not the Board actually claims that it has jurisdiction, but he is assessed a fine or penalty for not obeying an administrative regulative act which no one had ever held even applied to him.

As to every other regulative law, as to every other sort of administrative order, this Court has held that to thus assess a penalty was a deprivation of due process of law. As to a public service commission order in *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 310; 82 L. ed. 276, 281, this court said:

> "As the Act imposes penalties of from $500 to $2000 a day for failure to comply with the *order*, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the *order* in the courts would be a denial

of due process, . . ." (Italics supplied)

But evidently (based entirely upon circuit court rulings, review of which has been denied by this court) that rule or principle of due process does not apply to acts or orders relating to labor.

The rule which must be deduced from the holding of the Ninth Circuit in this case, and this court's refusal to review is that an employer acts at his peril in resisting a Labor Board complaint, and acts at his peril in attempting to obtain a judicial review of the validity of a Labor Board order.

In deep and humble humility we respectfully suggest that the two questions advanced herein merit the attention of this court; that not only the proper administration of the Labor Act will be facilitated thereby, but also the general welfare of the country.

A perusal of the decisions of the lower courts, and particularly of the Ninth Circuit in this case, and the Fifth Circuit in *National Labor Relations Board v. Gulf Public Service Company*, decided January 9, 1941, shows that they have interpreted the constitutional power over commerce among the several states, and the terms of the statute to mean that every business concern which has "any" effect, or which in "any" manner obstructs, or in "any" manner burdens, or in "any" manner impairs the flow of interstate commerce, to be subject to the Congressional power and to the Board's jurisdiction. This tendency has gone so far that the Fifth circuit in the case just cited felt that it was

bound by reason of prior decisions to find interstate commerce, even though "taking cognizance of such disputes is drawing a fine bead at a gnat's heel, indeed is almost a *reductio ad absurdo*, a running of the Act, its policies and purposes, into the ground". Its conclusion was:

> ". . . . we must, upon the question of the power of the Board, construing the Act as it has been construed, hold that it extends to any and all enterprises without regard to their magnitude, in which labor troubles might reasonably be said to have the probable effect of directly interfering with the free flow of *any* interstate commerce." (Italics supplied)

This trend is strikingly shown by the decision of the Ninth Circuit in *National Labor Relations Board v. Sterling Electric Motors, Inc.*, 112 F. (2d) 63, at 67, where the court said:

> "In one of the earliest decisions after National Labor Relations Board v. Jones & Laughlin Steel Corp., 304 U. S. 1, this court, in Edwards v. United States, 91 F. (2d) 767-78, construed that decision as extending the Congressional power even to the planting in California of orange trees whose product is 'to be transported' in interstate commerce."

The statement in the *Edwards* case referred to was where the court said the interstate commerce power might be extended to "*the planting, maintenance or abandonment of citrus groves*". If these cases state the law in reference to the constitutional grant of the power over commerce between states, then the suggestion in 51 *Harvard Law Review*, p. 1123, that "the doubt now is whether there are any limits on the Board's jurisdiction in the industrial or commercial

sphere" is true.

It seems to petitioner, however, that if any such principle is to be established, that it should be established only by this court.

In view of our Federal system it is almost impossible to believe that such is the law. If it is, then, as stated by Chief Justice Hughes in writing the majority opinion in *Schechter v. United States*, 295 U. S. 495, 546, 97 A. L. R. 947, 966, a national integrated government is now an accomplished fact:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace all the activities of the people and the authority of the state power over its domestic concerns would exist only by sufferance of the Federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to Federal control."

That a diminution of purchases by Sunshine Mining Company of materials and machinery which originate in states other than Idaho would be definitely indirect, has been held by this court in the same language in *Industrial Association v. United States*, 268 U. S. 64; *Levering & G. Co. v. Morin*, 289 U. S. 103; and in the *Schechter case*, supra, 547 in the following language:

> ". . . . for building is as essentially local as mining, manufacturing, or growing crops,—and if by resulting diminution of the commercial demands interstate trade was curtailed, either generally or in specific instances,

that was a fortuitous consequence, so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

This was not only the opinion of the unanimous court, but in a concurring opinion it was even exemplified further by Justices Cardozo and Stone. The quotation is definitely directed at the labor relations of a local business and in reference to a concern which purchases supplies coming directly from outside the state. The concurring opinion, p. 554, states:

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.

"Motion at the outer rim is communicated perceptibly, though minutely, in recording instruments at the center. A society such as ours 'is an elastic medium which transfers all tremors through its territory. The only question is of their size.'

"The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of forces that oppose and counteract them, there will be an end to our Federal System."

While we realize that the administration, in testifying before Congressional committees and in public statements, has definitely indicated that it is their opinion that the *Schechter* case has been overruled, yet this court has not so

stated. By reason of the cases hereafter referred to, we do not believe that it has been overruled, either directly or by implication, and should control this and all other similar cases until such time as this court definitely overrules the preceding authorities. Industry, and its attorneys, must assume that in view of the many quotations from, and approving citation of the Schechter case by this court, that it is still the law.

The House Committee in its Report of June 10, 1935 (Report No. 114) clearly stated what they intended by the language used in Sec. 2(7), which reads:

> "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The Committee said:

> "The new definition inserted by the committee amendment to subsection 7 also helps to confine the bill to the proper sphere under the *Schechter* decision by removing from its purview practices which merely 'affect' interstate commerce. Under this amendment the bill is confined to practices 'burdening or obstructing' interstate commerce. These words have received repeated recognition in court decisions as fit basis for Federal jurisdiction." Commerce Clearing House 1941 Labor Law Service, par. 1752, p. 1752.

In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 37, this court refers to burdens and obstructions which may be injurious to interstate commerce, and then states:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (Citing the Schechter case.)

Then states:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local, and create a completely centralized government. The question is necessarily one of degree."

In referring to the *Coronado* case the court at p. 90 stated:

> "And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employee's conduct."

This court, in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, continued the same principle of the constitutional limitation of federal power. It stated:

> "It is also clear that where federal control is sought to be exercised over activities which, separately considered, are intrastate, it must appear that there is a *close and substantial* relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still commerce

and not all commerce, but commerce with foreign nations and among the several states." (Italics supplied)

And:

"To express this essential distinction 'direct' has been contrasted with 'indirect', and what is 'remote' or 'distant' with what is 'close and substantial'. Whatever terminology is used, the criterion is necessarily one of degree and must be so defined."

And:

"The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a *close and substantial* relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceful adjustment of labor disputes." (Italics supplied)

It will be noticed that the requirement is a *direct and substantial* effect upon interstate commerce. This is saying in other language the same as was stated in the *Jones & Laughlin* case, *supra*, p. 32, in the following language:

"Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise."

The lower court cases referred to above and the one sought here to be reviewed have removed entirely any requirement of a close and substantial effect, or a close and substantial relation. In *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604, this court, carrying out the same

theory, added a requirement thereto, stating:

> "That those consequences may ensue from strikes of the employees of manufacturers who are not engaged in interstate commerce where the cessation of manufacture *necessarily* results in the cessation of the movement of the manufactured product in interstate commerce, has been repeatedly pointed out by this court." (Italics supplied)

The four cases from this court, just referred to, seemingly establish a principle, which principle, shortly stated, would seem to be: That, when attempting to exercise federal jurisdiction over an industrial activity or business which, when separately considered is local and intrastate, there must be found by the administrative body as a fact, based upon substantial evidence in the record, that a labor disturbance in such local activity would necessarily result in an immediate, direct and substantial diminution of the shipment of goods in interstate commerce, or an immediate, direct and substantial obstruction in the movement of goods or articles across state lines.

If this is a correct analysis of those four opinions, then the effect upon interstate commerce must be both direct and substantial. This not only is required by the constitution, we believe, but also by the statute. It refers to "materially affecting", "substantially burdening", "substantial obstruction", "substantially to impair". (Sec. 1) These two words "material" and "substantial" refer to something more than "any". They refer to something more than "slight". They mean considerable in amount or value or

the like. They carry forth the concept of importance. They certainly call for more than "any". Not only that, but from the use of the word "direct" as distinguished from "indirect" as used by the decisions, the doctrine of the Squibb case cannot be used to justify federal regulation.

We again call attention to the fact that the question raised here and in the first and second questions set forth in the petition for certiorari raises a question that must come up again and again until this court has definitely set a yardstick to apply to the intrastate operations where the production, sale and disposition of the product is all within the confines of one state. It is a question of immense importance in the administrative proceedings; extremely important because of the large, accumulating penalties which the Board imposes under the Act in the form of back wages, and the immense length of time that can occur between the alleged unfair labor practice and the order and findings of the Board, which in this case is practically eleven months, and the much longer time before a decision of a court is obtained. Here it was practically three years.

SECOND REASON FOR REHEARING

Upon the second question referred to herein, we ask the Court to consider the situation of an employer who is confronted with demands made under the alleged authority of the National Labor Relations Act. He does not believe he is subject to that Act, he is so advised by his attorneys—

he must seek advice from attorneys, there is no one else to whom to turn.

The attorney carefully and exhaustively examines into the employer's business and operations and into the decisions of this court. Then the attorney advises the employer—"It is my opinion that your operations are definitely intrastate, that you are not subject to the Act, but there is no way you can be sure, there is no way for you to find out. The Supreme Court in *Myers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41, 48-9, and in *Newport News S. & D. Co. v. Schauffler,* 303 U. S. 54, held that under Sec. 10(a) of the Act you cannot obtain a declaratory judgment establishing your liability or non-liability under the Act. The only way you can find out is by waiting until some one accuses you of an unfair labor practice; then wait until the Board elects to file a complaint against you; then go through a long and expensive hearing; wait until a trial examiner files an intermediate report; you must file exceptions thereto; must then either file briefs with the Board or pay the expenses of an attorney to go to Washington, D. C. to orally argue the facts to the Board, or both, and then wait until the Board enters an order. If the Board rules against you and holds that you are in interstate commerce, you may then appeal to the courts for an adjudication of the Act's applicability to you.

Now that would be all right, and would give you an adequate remedy from which you could obtain a definitive

adjudication. It will be extremely expensive, but if you can afford the expense I would advise you to do so.

But that is not all. If any men strike or quit or lose their employment, and the Board orders them reinstated, you may not only have to reinstate them, but will have to pay them back wages for work not performed from the time of the alleged unfair practices. And, as a year or more may elapse before the Board rules, the penalty which would be imposed upon you if the Act does apply might amount to millions of dollars."

Just what would the average employer do? He is given a Hobson's choice. He is presented with a dilemma, the horns of which are equally deplorable. He must either surrender his American right of a recourse to the courts, or he must gamble upon an attorney's opinion his entire business and financial solvency.

We submit that this is not equitable, not fair, and contrary to the entire history of American constitutional law as applied to regulatory laws. From *Wadley So. Ry. v. Georgia*, 235 U. S. 651, down to *Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300, this court has held such a dilemma to be a deprival of due process of law. It was to avoid such a dilemma in reference to all other questions of civil law that Congress and most states passed the Declaratory Judgment law.

When Congress passed the National Labor Relations Act it certainly never had in mind that an employer could or

would be punished, fined and penalized for seeking a court review of the Board's order. This is clearly shown by the fact that the Federal Trade Commission Act was the model followed. *Amalgamated Utility Workers v. Consolidated Edison,* 309 U. S. 261. The Congressional Committees in reporting the Act told Congress that an employer could not and would not be penalized or injured until a court decision had been rendered.

In House Committee Report of June 10, 1935, Report No. 1147, Commerce Clearing House, Labor Law Service, (1941) Par. 5826, p. 5282, the Committee said:

> "It is intended here to give the party aggrieved a full, expeditious and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

Under the Federal Trade Commission Act no penalties accrue prior to the decision of the Federal Trade Commission. There are no accruing penalties. There are no mounting sums which will be a fine or penalty if the industry obeys the order upon the day it is issued. And certainly that is what this Court had in mind when it stated through Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41 at 48, where, after referring to the House Committee;

> ". . . . and until the Board's order has been affirmed by the appropriate circuit court of appeals, no penalty accrues for disobeying."

Certainly, neither Congress when it passed the Act, nor this court when it decided the *Myers* case, ever dreamed that the Board could levy a fine upon an employer which would accumulate to $300,000.00 before the employer even had a chance to obtain a judicial decision as to whether or not the Act even applied to him.

It seems clear that all parties understood that if an employer immediately obeyed the Board's order he would not be subject to pay a huge accumulating penalty.

A proper construction of the Act precludes the accumulation of a penalty prior to the rendition of the Board's order. This is shown by Sec. 10(g) and (h). These read as follows:

> "(g) The commencement of proceedings under subsection (e) or (f) of this section, shall not, unless specifically ordered by the court, operate as a stay of the Board's order.
>
> "(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as to modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

Under these subsections, and Sec. 10(a) as construed in the *Myers* case, under the Board's contention we have this peculiar situation. Prior to the Board entering an order no

court has jurisdiction. If the unfair labor practice was committed on July 1, 1937, and the Board did not rule until January 1, 1940, the Board could enter an order requiring the reinstatement of an employee with back pay from July 1, 1937, or for two and a half years. This penalty would become absolutely vested and beyond the jurisdiction or power of any court to affect (assuming jurisdiction and substantial evidence), but immediately upon January 2, 1940, the employer could file a petition for review with a circuit court and then that court could stay the accumulation of the penalty from that day until this court had ruled upon a petition for certiorari, which could take even longer.

Then, if this court affirmed, the situation would be: The employed would be fined, punished and penalized by the Board for all the time when the employer was prevented by the Act from seeking a judicial decision upon the Act's applicability to him, but not punished for the time it took to get that decision after the Board had ruled. *Retail Food Clerks, etc. v. Union Premier Food Stores,* 98 F. (2d) 821 (appeal to this court dismissed because case had become moot).

It is inconceivable that this could be a tenable construction or interpretation of the Act.

In view of the legislative history and Justice Brandeis' statements in the *Myers* case, and the plain, ordinary logic of the situation, it would seem that the proper construction of the Act would be that upon the Board's order being filed

the back pay order would take effect, and the back pay then commence to accumulate. The employer then has an available remedy. He can then file a petition for review and with it an application for an order staying the accumulation of the back pay order until the Circuit Court has ruled, and if a petition is filed for a writ of certiorari after an adverse ruling, he can again apply for a stay. He thus can then obtain his day in court, can be heard and if the court refuses a stay will then know the possible cost of litigating.

It would give the employer a chance to then reemploy the named men, a chance to agree with the Board without ruinous penalties. This opportunity would tend to reduce the appeals to the courts by removing a large part of the incentive.

This interpretation would not only seem to be in exact accordance with the statute, but also with the committee report, and would fit into this court's decisions in the following cases which, while cited in the petition at pages 42 and 43 and above, we list for the court's convenience:

Wadley So. Ry. v. Georgia, 235 U. S. 651, 661, 662-3;
Southwestern T. & T. Co. v. Danaker, 238 U. S. 482, 491;
St. Louis I. M. S. Ry. v. Williams, 251 U. S. 63, 64-5;
Oklahoma Operating Co. v. Love, 252 U. S. 331, 338;
Carter v. Carter Coal Co. (Justice Cardozo's dissent), 298 U. S. 238, 240-1;
Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300, 310;
Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 48-9:
Sunshine Anthracite Co. v. Adkins, 310 U. S. 381, 464.

Such construction would be fair to all parties. The

Board can move just as fast or just as slow as it desires. *Amalgamated Utility Workers v. Consolidated Edison,* 309 U. S. 261. If it thinks the employer's practices are vicious it may file its complaint at once, have it set for hearing within five (5) days (Sec. 10(b)), its trial examiner could have his report out within a very few days, within twenty (20) days exceptions must be filed or the objections are waived (Rule 33, Code of Federal Regulations Sec. 202.33) and may within at least ten (10) days enter its order (Rules 32 and 34, Code of Federal Regulations, Sec. 202.32 and 202.34.) Thus, within not to exceed 60 days in an ordinary case, or 90 days at the most in almost any case, the Board may have its order entered and the fine, penalty and punishment accumulating, subject only to the power or jurisdiction of the Circuit Court under Section 10(g) and (h) to stay such accumulation.

It is fair to the employee and to the unions, for they may file their complaints of unfair labor practice at any time they so desire, and thus if they are found to be right by the Board, secure an early date for the commencement of the time when the penalties begin to accumulate.

But the employer is in no such enviable position. He cannot commence any proceedings to ascertain if he is either under the act or if he has been or is guilty of an unfair labor practice. He must sit back, absolutely helpless, and await the employees' or the Unions' grace. And as the Board claims that it can make the back pay commence accumulat-

ing at a date prior to the filing of an unfair labor practice charge, the employees or the Unions can increase the amount of possible penalty by delaying the filing of charges. Then the Board may take all of the time it desires between the filing of the charge and the filing of the complaint. It may be dilatory or prompt, as suits its convenience or whim. After the complaint is filed it may set it down for hearing at whatever date it chooses, as long as it is not sooner than five days. The hearing may be expedited or delayed, continued from time to time as it wishes. Its trial examiner can take all the time he wants, or that the Board allows him. There is nothing the employer can do.

After the exceptions are filed, the Board can hold a case for almost any length of time before entering its order. And if it orders reinstatement with back pay for a date six months prior to the filing of the unfair labor practice charge, the court must sustain it, if predicated upon substantial evidence, if the Board's construction of the Act is correct.

We realize that the Board has at all times insisted that the Act gave it this power, and that the lower courts have almost universally enforced such order, and that the position we are taking is contrary to language used by this court in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 and in *Republic Steel Corp. v. National Labor Relations Board*, 85 L. ed. 1. The question here raised was apparently not raised in either case.

We believe, however, that the foregoing argument

demonstrates that either Petitioner was deprived of due process or that the Board, at least, committed an abuse of discretion in awarding back pay which commenced accumulating on August 18, 1937, by an order not entered until July 1, 1938.

This is not asking the Court to give every employer one free chance to violate the law, similar to the saying "Every dog is entitled to one bite".

If it were not for Sec. 10(a) the employer could secure a declaratory judgment as to the Act's applicability before being made subject to huge fines and penalties.

If such accruing penalties are valid and within the Act and do not constitute a deprival of due process of law, then, for much greater reason, the question of jurisdiction and the extent of the commerce power should be clearly and distinctly enunciated by this court.

We respectfully pray for a rehearing of the denial of petitioner's petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

STATE OF WASHINGTON }
COUNTY OF YAKIMA } ss

JOSEPH C. CHENEY, *being first duly sworn, on oath deposes and says:*

That he is the attorney for petitioner in charge of this case, and hereby certifies that in his judgment the above and foregoing petition is well founded, and especially certifies that it is not filed or interposed for purposes of delay.

JOSEPH C. CHENEY.

Subscribed and sworn to before me this 4th day of February, 1941.

JOHN GAVIN,
Notary Public for Washington,
residing at Yakima therein.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 352

SUNSHINE MINING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 3191–3227) is reported in 110 F. (2d) 780. The decision and order of the National Labor Relations Board (R. 211–258) are reported in 7 N. L. R. B. 1252.

JURISDICTION

The decree of the court below (R. 3228–3233) was entered on April 3, 1940, and confirmed on June 18, 1940, following a rehearing (R. 3235). The petition for a writ of certiorari was filed on August 21, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925,

and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED[1]

1. Whether the National Labor Relations Act is applicable to petitioner, a corporation engaged in mining in the State of Idaho, upon findings that it receives for use in its operations substantial quantities of materials from other States, and that it sells all of the ore concentrate which it produces to a nearby smeltering concern which in turn ships in interstate commerce all of the metals derived from the further processing of petitioner's ore concentrate.

2. Whether there was a variance between the allegations of the complaint and the finding of the Board as to what unit of petitioner's employees was appropriate for collective bargaining, and whether petitioner illegally refused to bargain with an organization of its employees.

3. Whether the back-pay provision of the Board's order violates the Fifth Amendment as imposing a penalty interfering with petitioner's right to litigate the question whether the Act is applicable to it.

4. Whether it was within the power of the Board upon findings that petitioner had refused to bargain collectively with a labor organization designated by a majority of the employees in an appropriate

[1] The Board opposes review of questions 1–4, inclusive, but does not oppose review of question 5.

unit, to require petitioner to bargain collectively with that organization, although the organization, due to petitioner's unfair labor practices, had lost its majority by the time of the hearing.

5. Whether, in the circumstances of this case, it was within the power of the Board, in requiring petitioner to bargain collectively, to order petitioner to embody any understanding reached in a signed written agreement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151 *et seq.*) are set forth in the appendix to the petition, pages i–vii.

STATEMENT

Upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act,[1a] the Board, on July 27, 1938, issued its decision and order (R. 211–258). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

[1a] *I. e.*, amended charges filed by the International Union of Mine, Mill, and Smelter Workers, Locals 14 and 18 (R. 1–7); complaint (R. 82–96); answer (R. 26–51); hearing before a trial examiner, at which the Big Creek Industrial Union intervened; intermediate report of the trial examiner (R. 91–142); exceptions thereto by petitioner and the Big Creek Industrial Union (R. 142–202, 203–208); and oral argument before the Board.

[2] In the following statement, the references preceding the semicolons are to the Board's findings; those following ~~and~~ are to the supporting evidence.

Petitioner, a Washington corporation, maintains its principal place of business near Kellogg, Shoshone County, Idaho, where it is engaged in the mining and milling of silver ore (R. 217–218; 279, 283). Petitioner is the largest producer of silver in the United States (R. 218; 301, 303, 311–312); during 1936 it extracted and milled over 215,000 dry tons of ore, which yielded over 9,000,000 ounces of silver and lesser but substantial quantities of other metals [3] (R. 218; 282). During that year, 60 percent of the supplies, equipment, and electrical energy purchased by petitioner, at a cost of approximately $400,000, for use in its extractive and milling operations, moved to petitioner's premises from sources outside the State (R. 211; 1436–1443, 1451, 1456–1457).

After the ore is extracted from the mine, it is put through a process at petitioner's mill for removal of waste materials, and reduced to concentrate form (R. 218; 321–327). The concentrates are then shipped, pursuant to a long-term exclusive sales contract, to the Bunker Hill and Sullivan Smelter Company, hereinafter called the Smelter Company, located nearby in Shoshone County, Idaho (R. 218; 334–335). By the terms of the contract with the Smelter Company (R. 219–220; 365–380) petitioner agrees to sell and the Smelter Company to buy petitioner's total output

[3] The evidence shows that petitioner produced about 15 percent of the nation's total output of silver (R. 300, 303–304).

of ore concentrates (R. 219; 365–366); petitioner agrees to pay the Smelter Company a basic treatment charge for the further processing of the concentrates (R. 219; 372), and the Smelter Company agrees to pay petitioner 75 percent of the market value of the concentrates at the time of sampling and assaying, and the balance of 25 percent thirty days from the date of sampling (R. 219–220; 368–369, 374, 377).[4]

Upon delivery to the Smelter Company the silver concentrates are remilled, and are then commingled with concentrates from other mines, and subjected to a smelting treatment (R. 218–219; 1947, 1952–1954). The silver bullion in bar form is shipped by the Smelter Company to the United States Mint at San Francisco, California (R. 219; 30, 335–336, 351, 416–417, 1955), and the gold bullion to a Government depository at Seattle, Washington (R. 219; 359, 1956). The copper and lead are sold in the open market and shipped to various concerns throughout the nation (R. 219; 30, 272, 343–344, 347, 355–356, 1921).

In January 1937 the International Union of Mine, Mill, and Smelter Workers, Locals 14 and 18, hereafter called the Union, which is affiliated with the C. I. O., began an organizing campaign in the Coeur d'Alene mining area, in which peti-

[4] As the price of gold and silver are fixed by government decree, the Smelter Company probably disposes of these metals as soon as possible (R. 219). The Government affords a ready and unlimited market.

tioner's mine is located, and successfully negotiated a written contract on behalf of the employees of the Federal Mining Company (R. 222; 414–415, 418–419). Petitioner attempted to defeat the Union's membership drive among its employees by a company-sponsored petition and election (R. 222–227, 2611, 2766). The petitions, pledging its signatories to disregard any "strike," "labor holiday" or "picket line" unless sanctioned by "a majority vote at a secret poll among all employees" (R. 222–223; 142–157, 529), were drafted and circulated among the employees on June 23 and 24, 1937, with the active aid of petitioner's foremen and supervisory staff (R. 223, 285–286; 661, 727, 787, 856, 863–864, 873–874, 1117, 1161–1162, 1238–1239, 1340–1341, 2085–2086, 2309, 2312, 2394, 2449, 2611–2612). The election, held on June 24, was conducted on the following resolution, to which a "yes" or "no" answer was required (R. 224–225; 733):

> *Resolved,* That we as Sunshine employees, want no outside interference in our relations with the Sunshine Mining Company, at this time.
>
> That we will not respect any labor holiday, strike, or picket line unless a majority of all of the Sunshine employees vote for it by secret ballot.

The voting booth was constructed at petitioner's expense (R. 224; 856–857); its foremen joined in urging the employees to cast their ballots (R. 224;

846, 857, 1341–1342, 1377–1378, 2834–2835); Graham, general foreman, was on the scene throughout the voting (R. 224; 2834); and eligibility to vote was determined by petitioner's timekeeper (R. 224; 499, 743, 794, 1124). During this period supervisors of petitioner made remarks to various employees derogatory to the Union or to the C. I. O. (R. 226–227; 2308–2309, 2313–2316, 2683, 2686). On June 26, petitioner posted at the mine a statement of labor policy, advising the employees, among other things, that petitioner would "bargain collectively with groups or organizations" only "to the extent of their membership" (R. 233; 33, 48–51, 427–430).

Notwithstanding petitioner's efforts, the Union campaign continued with success. On June 28, 1937, the Union represented a majority of petitioner's employees in a unit appropriate for collective bargaining purposes.[5] On that date, representatives of petitioner and the Union met in the first of three meetings (R. 233–234; 434–435, 436,

[5] The Board found that the mine and mill employees of petitioner, excluding supervisory, clerical, and technical employees—constituted an appropriate unit for collective bargaining; and that on June 28, July 9, and August 2 and thereafter a majority of the employees composing this unit had designated the Union as their representative for collective bargaining with petitioner (R. 227–233; 85, 124–130, 142, 187–189, 229–230, 232, 602–649, 661, 664–665, 667, 670–679, 896–899, 908, 910, 938–980, 980–981, 989, 995–1033, 1034–1044, 1061–1062, 1063–1081, 1082, 1158–1159, 2143–2144, 2434–2435, 2556–2557, 2558–2560).

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2859–2860). Acting as spokesman for the Union, McGuire, the Union's organizer and business agent, advised Leisk, general manager for petitioner, that the Union represented a majority of the employees (R. 234; 2867–2868). McGuire then submitted copies of a proposed trade agreement, embodying a request of the Union for recognition as the sole collective bargaining agency for petitioner's employees (R. 234; 432, 436, 448–452, 465–466, 2860). Leisk informed the Union representatives that he doubted the Union's majority status,[6] but declined to discuss the question of exclusive recognition on the ground that the posted statement of policy set forth petitioner's position in that respect (*i. e.*, that it would bargain with groups of employees only to the extent of their membership) (R. 234; 2861, 2871).

The second conference, on July 9, brought no relaxation of petitioner's stand. General Manager Leisk declared that petitioner would not enter into a written contract with the Union even if it represented 95 percent of the employees, and that petitioner would deal with the Union only to the extent of its membership (R. 235–236; 2874–2875; 2925).

On August 1, following a strike vote, the Union called a strike and established a picket line near the mine (R. 236; 272, 454–455, 477, 735, 747). A third

[6] Leisk refused McGuire's offer to submit the question of majority representation to the Board for determination, on the ground that the Board had no jurisdiction over petitioner (R. 234; 437).

and final conference was held on the following day, but Leisk stated that petitioner's position was unchanged (R. 236–237, 490–492, 2879–2881).

The Board found that petitioner, by its refusals to accord to the Union exclusive bargaining rights and by its refusal to embody understanding, if reached, in a signed agreement, had violated Section 8 (5) of the Act; further, that petitioner's unlawful refusal to bargain caused the strike of its employees commencing on August 2, 1937 (R. 237).

Petitioner sought to break the strike by various steps calculated to intimidate the employees. While the Union's strike vote was being taken the "Committee of 356" appeared on the scene as an organization of employees opposed to the strike; its first meeting was launched by an employee named Higgins at a boarding house on petitioner's premises (R. 238; 1855, 1733, 2879). Higgins was succeeded as chairman by an employee named Best, who appointed Higgins and an employee named Kulm as his assistants (R. 238; 1669–1670, 1729, 1857). On July 31, a notice over the signature of Best was posted on the company bulletin board, which "called" all of the employees "interested in their jobs" to a mass meeting to be held on August 1 (R. 238; 925–926). A foreman of petitioner commissioned an employee to stand guard over the notice (R. 238, 927–928). At the August 1 meeting of the Committee of 356, also held at the boarding house, an official of petitioner addressed the employees and arranged for their transportation

through the picket line (R. 238; 1126–1134, 1697, 1720, 1721, 1733–1734, 1742).

At the inception of the strike on the morning of August 2, petitioner delegated to the Committee of 356 the conduct of all matters pertaining to the strike, including the policing of the mine and the task of getting the employees through the picket line (R. 239; 1611, 1617–1621, 1750, 1789, 1863–1867). Best, Higgins, and Kulm were given the use of petitioner's office facilities, as well as a company car (R. 239; 1621–1622, 1743–1744, 2988). They were joined by a publicity expert procured by petitioner, who assisted in the promotion of a comprehensive publicity campaign designed to influence public opinion and break the morale of the strikers and pickets (R. 239; 1674, 1675, 1679, 1690–1691, 1695–1696, 1698–1699, 1708, 1713, 1867).

On August 4 over 200 telegrams signed by employees were sent to the Governor of Idaho, requesting militia protection against the strikers, who were said, falsely, to be getting out of hand (R. 239–240; 284, 318–319, 1469, 1562, 1594, 1788, 1784, 1787, 1891–1892, 2009–2010, 2047–2048, 2242–2251–2252). Petitioner financed, and was responsible for, these telegrams, in an effort to obtain a show of military force to break the strike (R. 239–240; 1536–1540, 1549–1552, 1553, 1601–1604). Soon after the strike was called John Kitkowski, petitioner's machine shop supervisor, formed an organization of Vigilantes, whose avowed purpose

was to "break the C. I. O." and to "take care of any radical organizing the mines" (R. 240; 318–319, 1159, 1239–1243, 1249–1250, 1469, 1473, 1475–1476, 1480, 2860).

Arrangements for a mass demonstration against the strikers were made by petitioner (R. 240; 1680–1681). Kitkowski supervised the preparation and widespread distribution of Vigilante buttons and handbills, warning that "Vigilantes are ready to take care of any radical organizers. * * * Ropes are ready" (R. 240–241; 893, 1476–1478). Through Best and the Committee of 356, petitioner issued a challenge to the strikers to appear at the mine on August 8 "in military formation" and face the assembled employees of petitioner and other mines in the area (R. 241; 1355, 1681–1684, 1686–1687). About 10,000 handbills announcing the projected assemblage were distributed (R. 241, 243; 1355, 1688). On August 7, the strikers were warned by a State law enforcement officer, who was attempting mediation, that the strike was lost, since the planned demonstration could not be checked (R. 241–242; 922, 1151, 1185, 1187–1189, 1204, 1270, 1284, 1285, 1320). The strikers capitulated, and the picket line was withdrawn (R. 241–242).

Petitioner thereupon converted the scheduled demonstration into a victory celebration. Its high officials addressed the crowd of 2,000 in a strongly antiunion vein (R. 242; 1291, 1302–1303, 1888, 2667). The employees were given a holiday with

pay and were supplied with free beer (R. 242; 318, 1165, 1687–1688, 1699, 1702–1703, 1704, 1708–1709, 1710–1712, 1871–1872, 2735). During the celebration that followed, one group paraded to the C. I. O. headquarters and carried away its sign, while another threatened a Union employee with death, and drove him from the district (R. 242; 318, 319, 1206–1219, 1352–1353, 1708–1709, 2735).

After the discontinuance of the picket line, some 60 strikers applied for reinstatement (R. 243–247; 1243, 1309). They were referred to the Committee of 356, to which petitioner had delegated authority to pass upon reinstatement (R. 244; 795, 838, 849, 870, 884, 1276, 1281–1282, 1324, 1370–1371, 1376, 1380–1381, 1410, 1622, 1744). Applicants who had served on the picket line were denied reinstatement; nonpicketing strikers were reinstated (R. 244; 1208, 1216, 1309, 1312, 1367, 1500–1502, 1506, 1511–1512, 1528, 1744, 1752–1755, 1805, 1876, 1877, 1889).

Finally, in order to consolidate its antiunion gains, petitioner, acting through Best, the chairman of the Committee of 356, formed and dominated the Big Creek Industrial Union (R. 249–251; 3015). Best and his aides planned and supervised each step in the formation and launching of the Big Creek Union, which proved impotent as a collective-bargaining medium (R. 250–251; 1763–1766, 1767, 1769–1770, 1880, 2262–2263, 2965, 2966–2967, 2967–2968, 2972, 2979–2985, 2990–2991, 3003, 3014–3015, 3016).

The Board found that, by the foregoing acts, petitioner had engaged in unfair-labor practices within the meaning of Section 8 (1), (2), (3), and (5) of the Act (R. 227, 233, 237, 243, 247, 251). The Board ordered petitioner to cease and desist from these unfair practices; to bargain collectively with the Union and to embody any understandings reached in a signed agreement; to offer reinstatement to all employees who went on strike on August 2, with back pay from August 18, the date of the discrimination against them; to withdraw recognition from and disestablish the Big Creek Union; and to post appropriate notices (R. 255–258).

On April 15, 1939, the Board filed in the court below a petition for enforcement of its order (R. 265–271). On April 3, 1940, the court handed down its decision and entered its decree enforcing the Board's order in full, save for a minor modification requested by the Board (R. 3190–3233). On June 18, 1940, after a rehearing limited to a single issue, the decree was affirmed in all respects (R. 3234–3235).

ARGUMENT

The Board does not oppose the granting of a writ limited to the "signed contract provision." See *infra* pp. 23–25. We respectfully submit, however, that none of the numerous other questions urged by petitioner warrants review.

1. *Jurisdiction of the Board.*—The facts as to petitioner's business are not in substantial dispute. The evidence reviewed in the Statement, *supra,* pp. 4–5, shows that petitioner's ore and concentrates proceed in a continuous flow of enormous volume from petitioner's mine and mill through the refining plant of the Smelter Company and thence to out-of-State destinations.[7] These facts establish the applicability of the Act to petitioner, since they leave no doubt of the disruptive effect upon the flow of interstate commerce that would result from a stoppage of petitioner's operations by industrial strife. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 41; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 60 S. Ct. 918. The factor, which petitioner stresses (Pet. 17–21), that between the time its products are mined and the time they enter the avenues of interstate commerce they are purchased and processed

[7] Since the total output of the Smelter Company is admittedly shipped to out-of-State destinations (R. 30), it is difficult to see what support for its contention petitioner draws from the fact, which it emphasizes, that the Smelter Company commingles the concentrates secured from petitioner with those from other sources, so that the origin of any particular lot of refined metal cannot be determined.

More than one-half of the Smelter Company's total output of metal is refined from petitioner's concentrates (R. 335–336, 356–358).

by another concern, does not alter the direct dependence of the interstate shipments upon petitioner's mining and milling operations. In the *Consolidated Edison*, *Fainblatt*, and *Bradford Dyeing* cases, this Court held that enterprises conducted within State lines were subject to the Act, since it was apparent that an interruption in the operation of these enterprises by industrial strife would directly and immediately impair the interstate operations of their customers.[8]

The decision below is not, as petitioner contends (Pet. 29; Br. 15–16), in conflict with the prior decision of the same court in *National Labor Rela-*

[8] There is no basis for petitioner's claim (Pet. 3, 29; Br. 4) that the Board failed to make sufficiently explicit findings of fact with respect to the effect upon interstate commerce of a stoppage of petitioner's operations. The Board found that "the operations of the respondent [petitioner] and the Bunker Hill Company [the Smelter Company] together constitute a direct and continuous flow of commerce across State lines to the mint and the market" (R. 221), and that "the activities of the respondent [petitioner] * * * occurring in connection with the operations of the respondent [petitioner] * * * have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce" (R. 251). These findings were based upon detailed subsidiary findings as to the "essential basic facts" of petitioner's business (R. 217–221); and obviously comply with the requirements laid down in *Atchison, Topeka and Santa Fe R. Co.* v. *United States*, 295 U. S. 193, 202; *Florida* v. *United States*, 282 U. S. 194; and the other cases upon which petitioner relies.

tions Board v. *Idaho-Maryland Mines Corp.*, 98 F. (2d) 129. In the present case the court below expressly distinguished the *Idaho-Maryland Mines case*—wherein the gold and silver mined in California by the employer were sold and shipped by it to a United States mint, or to a refinery, both of which were located in California—on the ground that it there viewed the subsequent out-of-State shipments made by the United States "not as commercial transactions, but as administrative acts of government (R. 3197–3198)."[9]

2. *The bargaining unit.*—Petitioner asserts that there was a variance between the complaint and

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[9] The jurisdiction of the Board likewise may be rested upon the proof that petitioner purchases and receives in interstate commerce supplies, equipment, and energy having an annual value of nearly $400,000. (R. 1436–1451, 1456–1457.) The supplies and equipment move regularly to petitioner's mine and mill each month (R. 1436–1443). The court below noted these facts (R. 3194, 3198).

The various circuit courts of appeals have drawn no distinction between incoming commerce and outgoing commerce in applying the jurisdictional test laid down in the *Jones & Laughlin* and other decisions of this Court, and have uniformly held the Act applicable to protect a flow of materials into the State. *Newport News Shipbuilding Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), affirmed, 308 U. S. 241; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951, 954 (C. C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding and Dry Dock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *Consumers Power Co.* v. *National Labor Relations Board*, decided June 27, 1940 (C. C. A. 6); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 542–543 (C. C. A. 10).

the Board's finding as to what unit of employees was appropriate for collective bargaining, with the result that petitioner was unconstitutionally denied a hearing on the question whether the Union represented a majority of the employees in the unit found by the Board to be appropriate, and with the further result that there is no evidence in the record on that question (Pet. 3, 9–17, 29–34). Petitioner's argument is that the unit alleged in the complaint (R. 85) consisted of "all" of the employees with the exception of those employed in a supervisory, clerical, or technical capacity, and that the Board in its decision narrowed the appropriate unit to include only "mine and mill" employees (excepting also the categories excluded in the complaint), thus leaving outside the unit workers in other classifications, such as those employed in the machine or electrical shops.

It is perfectly clear that the unit alleged in the complaint and that found by the Board are identical.[10] The complaint alleged (R. 85):

> The mining and milling operation is closely integrated, and all the employees of the respondent with the exception of supervisory officials, executives, technicians, of-

[10] Petitioner's argument, though pressed in the court below, was not noticed in the opinion, unless by the following statement (R. 3213): "The complaint alleged that the mine and mill employees of respondent, excluding supervisory, clerical, and technical employees, constituted an appropriate unit for collective bargaining, and the Board so determined."

> fice employees, and employees working in the boarding and rooming establishment conducted by the respondent on the mining premises constitute a unit appropriate for the purposes of collective bargaining * * *.

The Board's decision reads (R. 228):

> We find that the respondent's mine and mill employees, excluding supervisory, clerical, and technical employees, constitute a unit appropriate for the purposes of collective bargaining * * *.

While there is thus a slight difference in phraseology between complaint and finding, the context of the Board's decision plainly reveals that the phrase "mine and mill employees" was employed merely as meaning all employees other than supervisory, office, or technical employees.[11] In its

[11] The paragraphs of the Board's decision immediately preceding the quotation above, read (R. 227–228):

"It is alleged in the complaint that the respondent's name mine and mill employees, excluding supervisory, clerical, and technical employees, constitute a unit appropriate for the purposes of collective bargaining. The respondent urged that the appropriate bargaining unit should include office and technical employees.

"It is clear from the discussion in Section I above concerning the respondent's business that the operations of the mine and mill are closely integrated. The mine and mill employees are paid on a daily or shift basis, while office and technical employees are paid on a regular salary basis. The respondent itself recognizes that a distinction exists between the mill and mine employees and the clerical and technical employees by carrying them on separate pay rolls. The unit advocated by the Union and alleged in the complaint as ap-

decision, the Board specifically stated that it was adopting the unit set forth in the complaint, and the Board used that unit as the basis of its computations in determining whether the Union represented a majority (R. 229, *supra,* p. 7). Moreover, if the Board had intended to include only the employees working underground in the mine or within the confines of the mill itself, there would have been no reason for it to specify the exclusion of clerical and technical employees.

Intermingled with its claim of a variance between complaint and finding as to the appropriate unit, petitioner contends that the Union, in its attempt to bargain with petitioner, claimed to represent "all" the employees, whereas it admittedly did not represent a majority of all employees including office and technical employees, and that it was therefore proper for petitioner to refuse to bargain with the Union. This contention is of a part with petitioner's claim of a variance. On June 26, 1937, two days before the Union's first bargaining overtures were made, petitioner had posted a statement of labor policy, declaring that it would bargain with organizations only "to the extent of their membership" (*supra,* p. 7). When the Union on June 28 sought recognition as the bargaining agent

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propriate is one which has prevailed in the industry for many years, and which we have found under similar circumstances to be appropriate. The evidence does not disclose any reason for departing from the unit claimed by the Union."

for "all" employees, it was seeking only to avoid the unlawful restriction petitioner had imposed and to bargain for non-union employees as well as its members. Petitioner evidently so understood at the time, since it raised no questions as to the appropriateness of the unit for which the Union sought to bargain, but instead, as the court below emphasized (R. 3215), merely reaffirmed its declaration of policy (*supra*, p. 8).[12]

Petitioner's claims of variance and failure of proof are similar to and as unsubstantial as those rejected in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351.

3. *The back pay award.*—The Board's order awards back pay to those of petitioner's striking employees who were not reinstated following the strike, the back pay to run from August 18, 1937, the date of petitioner's unlawful discrimination in reinstatement of the strikers (see *supra*, pp. 12). Petitioner urges that the back pay award violates the Fifth Amendment, as imposing a cumulative penalty interfering with petitioner's right to litigate the question whether the Act is applicable to it (Pet. 4–5, 41–44). An identical contention was unsuccessfully urged in the petition for certiorari

[12] At the hearing before the trial examiner, petitioner's president, R. M. Hardy, summarized its position, stating "We would recognize the Union to the extent of their membership," but "refused to take them as the sole bargaining agency" (R. 1623).

in *Carlisle Lumber Co.* v. *National Labor Relations Board,* 94 F. (2d) 138 (C. C. A. 9), certiorari denied, 304 U. S. 575, and is answered in the brief in opposition filed in that case, to which the Court is respectfully referred.

4. *The order to bargain.*—Petitioner attacks the provisions of the Board's order directing it to bargain with the Union on the ground that, whether or not the Union represented a majority of the employees at the time of the refusal to bargain, it had lost its majority to the Big Creek Industrial Union the time of the hearing (Pet. 5, 44–46). This contention is squarely foreclosed against petitioner by the decision of this Court in *National Labor Relations Board* v. *Bradford Dyeing Ass'n.,* 60 S. Ct. 918. There, as here, the asserted repudiation of the outside union and the selection of the company-dominated organization was a direct consequence of a variety of flagrant unfair labor practices,[13] which, the Court held, could not operate to change the freely chosen bargaining representative. 60 S. Ct., at 929. Accordingly, the Board was fully justified in ignoring the purported designation of the Big Creek Industrial Union and in issuing an order to bargain with the Union, premised upon the

[13] Petitioner's statement (Pet. 45) that "it is stipulated" the men freely and voluntarily joined the Big Creek Union is misleading. The stipulation to which petitioner refers (R. 2126–2127) was to the effect that a number of the employees would so testify.

continued free designation of the Union by a majority of the employees but for the unfair practices.

Petitioner further argues that, in any event, the lapse of time since the hearing requires that enforcement of the bargaining order be conditioned upon an election, and that in not so holding the decision of the court below conflicts with decisions of other Circuit Courts of Appeals (Pet. 46–48). But at final hearing in the lower court petitioner's sole contention in this regard was the one considered above, that the Union's majority had been lost to the Big Creek Industrial Union by the time of the hearing; upon this ground petitioner objected to any enforcement of the bargaining order.[14] It was not until the lower court's decision came down, upholding the bargaining order over this objection, that petitioner, in a voluminous petition for rehearing, advanced the additional and different claim now asserted, that enforcement of the bargaining order should be conditioned upon an election because of the lapse of time subsequent to the hearing.[15] That the court below did not deem this belated objection to be properly before it, or con-

[14] "Brief for the Sunshine Mining Company," No. 9162, pp. 82–83, 84.

[15] "Petition for Rehearing of Respondent, Sunshine Mining Co.," No. 9162, pp. 25–31. This document totalled 91 printed pages, 6 pages more than petitioner's main brief upon final hearing.

sider or pass upon it, is plainly suggested by the fact that the rehearing granted was limited to the single issue of the propriety of the back-pay order (R. 3233–3234). In these circumstances, it would seem that petitioner may not urge the contention in this Court. In any event no clear case of conflict of decisions can be made out.

5. *The signed contract provision.*—The Board found that petitioner had refused to bargain with the Union, in violation of the Act, (a) by refusing to award the Union exclusive bargaining rights, and [16] (b) by refusing to embody understandings, if reached, in a written signed agreement (R. 237). The Board, in ordering petitioner to bargain collectively with the Union, required it to embody any understandings which might be reached in a signed written agreement, if requested to do so by the Union (R. 257).

The court below unanimously upheld this provision of the Board's order, as affirmative relief within the power of the Board in the circumstances of this case (R. 3226, 3227). One of the judges

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[16] The ample evidence heretofore referred to (*supra*, pp. 8–9), consisting in part of admissions by petitioner's officials, that petitioner declined to grant the Union exclusive recognition as required by Sections 8 (5) and 9 (a), dispose of petitioner's contention that there is lack of evidenciary support for the Board's finding that it refused to bargain collectively.

agreed with the Board that petitioner's refusal to enter into a signed written agreement was an unfair labor practice under the Act (R. 3210–3212); the other two judges held that the question was not before the court, and expressed no opinion on it (R. 3226, 3227).

On the question of the Board's affirmative power, the decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *M. H. Ritzwoller Co.* v. *National Labor Relations Board,* decided May 8, 1940. In the *Ritzwoller* case the Board did not pass upon the question whether a refusal to sign a contract, after an agreement had been reached, was a refusal to bargain, but, upon findings of violation of Section 8 (5) in other respects, directed the employer to bargain and reduce understandings, if reached, to a written agreement (15 N. L. R. B. 15, 24–27, 31, 35). The Seventh Circuit upheld the Board's findings of unfair labor practices, but refused to enforce the written-agreement provision of the order.[17]

Further, it appears that both of the foregoing aspects of the written-agreement question are pre-

[17] The decision below is not in conflict on this point with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, as petitioner contends (Pet. 49). There is no suggestion in the opinion of the court below that the Act compels the reaching of any agreement.

sented for disposition by this Court,[18] in *H. J. Heinz Co.* v. *National Labor Relations Board,* certiorari granted June 3, 1940, No. 73, present Term.

Accordingly, because of the conflict noted, and because the question is before the Court in the *Heinz* case, the Board does not oppose the granting of a writ on this question. If review is granted, however, it is submitted that it should be limited to the "written agreement" issue, on which conflict exists, and that the order of the Court should provide that it shall not operate to suspend enforcement of the other provisions of the decree below, which are clearly separable. Cf. *Republic Steel Corp.* v. *National Labor Relations Board,* certiorari granted May 20, 1940, No. 707, last Term. Here, as in the *Republic Steel* case, the Board's order is designed to remove the serious economic dislocation produced by petitioner's flagrant and sweeping violations of the Act, which affect a great

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[18] In the *Heinz* case, the Sixth Circuit said (110 F. (2d) at 849):

"We * * * approve the Board's conclusion that respondent violated § 8 (5) by not embodying the understandings reached in a signed agreement.

"However, if the view of the Seventh Circuit be accepted, it does not follow that the Board's order is invalid. We are of the opinion that the order is more obviously justified by § 10 (c), which requires the Board, when it has found an employer guilty of an unfair labor practice, to serve an order 'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, * * * as will effectuate the policies of this chapter.'"

number of employees and have gone unremedied since August 1937.

CONCLUSION

We do not oppose review limited to the "written agreement" question, upon which alone a conflict exists. The petition presents no other substantial question of public importance.

Respectfully submitted.

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